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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEVIN Q., Respondent, v. LAUREN W., Appellant.	G040343 (Super. Ct. Nos. 07P000228 & 07P000341) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on June 19, 2009, be modified as follows:

1. On page 11, in the seventh line of the first full paragraph, strike the comma after the word "child" and replace it with a semicolon.

2. On page 12, first through fifth lines, the following sentences and citations are stricken: "The blood tests must be requested within two years of the child's birth. (§ 7575, subd.

(b)(3)(A).) A person may request such tests, inter alia, 'in an action to determine the existence or nonexistence of the father and child relationship pursuant to Section 7630 . . . .' (§ 7575, subd. (b)(3)(A).)" In their place, the following is inserted:

> "The notice of motion for genetic tests under [section 7575] may be filed not later than two years from the date of the child's birth by a local child support agency, the mother, the man who signed the voluntary declaration as the child's father, or in an action to determine the existence or nonexistence of the father and child relationship pursuant to Section 7630 or in any action to establish an order for child custody, visitation, or child support based upon the voluntary declaration of paternity." (§ 7575, subd. (b)(3)(A); see also § 7551 [in action where paternity is relevant, court "shall upon motion of any party" order the alleged father to submit to genetic tests].) Even when genetic tests show that a man who signed a declaration of paternity is not the child's biological father, the court may decide that denying an action to set aside the declaration is in the child's best interests, considering factors such as the child's age and duration of relationship with the declarant, and the length of time since the declarant signed the declaration. (§ 7575, subd. (b)(1)(A), (B) & (C).)

3. At the end of the first full paragraph on page 14, after the sentence ending "presumed under subdivision (d) or (f) of Section 7611," but before the citation "(§ 7630, subd. (b).)," insert the following footnote, which will require renumbering of all subsequent footnotes:

> In Kevin's petition for rehearing, he contends section 7570 et seq. contemplates "a process by which the unwed father attests to his

paternity before, at, or shortly after the birth of his child," "not that [the statute] could be used to defeat the rights of another putative or presumed parent years after the child's birth." As discussed above, the statute contains no deadline for signing or filing a voluntary declaration of paternity. Whether the statute should be amended to specify such a deadline or timeframe is for the Legislature to decide. In its current form, the statute provides a simplified system for a biological father to establish his paternity, even if he belatedly discovers his paternal status or belatedly decides to accept responsibility for a child. This open-ended opportunity is similarly available to a man who belatedly petitions for paternity under section 7611, subdivision (d). Such a presumed father may obtain a paternity judgment, so long as no other man has already obtained such a judgment. (§ 7612, subd. (c).) In this respect, the statutory scheme rewards the father who is the first to obtain a judgment establishing his paternal rights and responsibilities.

4. At the end of the last paragraph on page 19, after the sentence ending "challenging Brent's voluntary declaration," insert the following footnote, which will require renumbering of all subsequent footnotes:

In an argument raised for the first time in his petition for rehearing, Kevin asserts that our construction of sections 7573 and 7612 "pushes [the statutes] into unconstitutionality." We address this argument briefly, even though "[i]ssues raised for the first time on . . . rehearing will normally not be considered." (*Hittle v. Santa Barbara County Employees Retirement Assn*. (1985) 39 Cal.3d 374, 391, fn. 10.) Kevin argues sections 7573 and 7612, subdivision (c) are unconstitutional unless interpreted to

apply only to cases where there is no presumed father competing with the man who signed a voluntary declaration of paternity. He claims that if the voluntary declaration of paternity is given the effect of a judgment, thereby conclusively rebutting a rebuttable presumption of paternity under section 7611, "presumed fathers [are deprived] of standing to protect the continuity and integrity of their relationships." Not so. Section 7575, subdivision (b)(3)(A) authorizes a court to set aside a voluntary declaration of paternity based on genetic tests ordered in a section 7630 paternity action. Thus, a presumed father under section 7611, subdivision (d), may bring a paternity action under section 7630, subdivision (b), and in that action obtain an order for genetic testing to challenge the paternity of a competing father who has signed a voluntary declaration. The presumed father has not been deprived of an opportunity to be heard. The Legislature has simply limited the grounds upon which he may obtain relief.

5. At the end of the second full paragraph on page 23, after the sentence ending "rewrite the legislative scheme," insert the following footnote, which will be the last footnote in the opinion:

In his petition for rehearing, Kevin asserts *Kusior v. Silver* (1960) 54 Cal.2d 603 interpreted a blood test statute in a flexible way so as to protect existing paternity presumptions, and suggests this court should follow suit. Somewhat misleadingly, he asserts *Kusior* held that "the Blood Test Act did not trump nor modify the statutory presumptions in any way," despite "absolute statutory language that facially required parentage to be determined by biology as evidenced by blood tests." In fact, *Kusior* held that (1) blood tests *do* conclusively rebut the rebuttable presumptions of

paternity (*id.* at p. 620); but (2) blood tests do *not* conclusively rebut the conclusive legitimacy presumption for the child of a wife "cohabiting" with her husband, because the conclusive presumption statute contained the language, "'*Notwithstanding any other provision of law*" (*id*. at p. 618) and because the Legislature chose *not* to adopt a section of the Uniform Blood Test Act which provided that blood tests would overcome the conclusive presumption (*id.* at pp. 618, 620). Here, similarly to the *Kusior* result, voluntary declarations of paternity *do* override rebuttable presumptions of paternity such as the section 7611, subdivision (d) presumption. In other words, *Kusior* supports the conclusion that a voluntary declaration of paternity trumps the rebuttable presumption under which Kevin claims paternity.

The petition for rehearing is DENIED.

The modification does not change the judgment.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.